NUREMBERG MOOT COURT, 2025

TEAM NO. 2025-207

DEFENCE

TABLE OF CONTENTS

I. THE PREREQUISITES FOR HOLDING A CONFIRMATION OF CHARGES HEARING IN ABSENTIA AGAINST MR. JASPER RHODES REMAIN UNSATISFIED.

[1] An *in absentia* confirmation hearing may only take place if the conditions stipulated under Art. 61(2)(b) of the Rome Statute (RS) are fulfilled.[1] Additionally, Art. 61(2)(b), read with Rule 125(1) Rules of Procedure and Evidence (RPE), makes *in absentia* confirmation hearings discretionary and the prosecution has to show that sufficient cause exists to proceed with the same.[2]

[2] Presently, the requirements under Art. 61(2)(b) have not been met as Mr. Rhodes cannot be considered as a person who "cannot be found" **(I.A.)**, and all reasonable steps have not been taken to secure his appearance and to inform him of the charges **(I.B.)**. *In arguendo*, even if the requirements under Art. 61(2)(b) are met, no cause exists to have the confirmation hearing *in absentia* **(I.C.)**.

[I.A.] MR. JASPER RHODES CANNOT BE DEEMED TO BE A PERSON WHO "CANNOT BE FOUND".

I.A.1. The Rome Statute requires the accused's initial appearance before the PTC can proceed with an *in absentia* confirmation hearing.

[3] The framework of the RS requires the accused's "surrender or voluntary appearance", i.e., initial appearance before the PTC under Art. 60(1).[3] As per Art. 61(1), the confirmation hearing is to be held "within a reasonable time after the person's surrender or voluntary appearance before the Court", i.e., after the initial appearance hearing.[4] Thus, the suspect's initial appearance is established as a prerequisite for holding the confirmation hearing.[5] This is furthered by the fact that Art. 60(1) is not caveated by any reference that it is "subject to" the provisions of Art. 61(2)(b).[6] Thus, allowing an *in absentia* hearing without an initial appearance would be contrary to the Statute's framework.

[4] In this respect, it is submitted that the PTC's observations in *Kony*[7] pertaining to the initial appearance not being a prerequisite for an *in absentia* confirmation hearing should be referred to with caution. Not only did the *Kony* decision fail to acknowledge the procedural significance of Art. 60(1), but a leave for appeal against this decision has been accepted,[8] raising doubt over its legal soundness.

[5] While Art. 61(2)(b) distinguishes between the two scenarios of an accused who has "fled" and one who "cannot be found", indicated by the disjunctive use of *or* between the two, this distinction does not justify an interpretation that would nullify Art. 60(1). The provisions of an international

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[1] Rome Statute, Art. 61(2)(b).
[2] Otto Triffterer and Kai Ambos, *The Rome Statute of the International Criminal Court: Article-by-Article Commentary* (4th ed., 2022), p. 1772.
[3] Rome Statute, Art. 60(1).
[4] Rome Statute, Art. 61(1).
[5] Christoph Safferling, *Towards an International Criminal Procedure*, (2012), p. 323.
[6] Antonio Cassese, Paola Gaeta and John RWD Jones, *The Rome Statute of the International Criminal Court: A Commentary*, (2002), p. 1244.
[7] ICC, *The Prosecutor v. Joseph Kony*, ICC-02/04-01/05, Decision on the criteria for holding confirmation of charges proceedings in absentia, 23 November 2023, paras. 29 and 30.
[8] Id., para. 38.

instrument must be interpreted harmoniously.[9] Constructions of a provision nullifying the operation of another provision must be avoided.[10] Thus, Art. 61(2)(b) should not be interpreted to allow an *in absentia* trial without an initial appearance, as the same would effectively render Art. 60(1) nil.

[6] A legally sound interpretation of Art. 61(2)(b), consistent with Art. 60(1), would thus deem the term "fled" to refer to an individual deliberately evading the Court's jurisdiction, and "cannot be found" to refer to an individual who is untraceable due to reasons such as abduction, illness, or any other cause that does not amount to wilful evasion. This distinction was drawn by the STL in a pretrial context in the *Ayyash* case when interpreting the phrase "absconded or otherwise cannot be found".[11]

[7] Such an interpretation would be in consonance with the drafting history of the RS, a supplementary means of interpretation as per the Vienna Convention on the Law of Treaties.[12] The drafters of the RS explicitly rejected a proposal to extend *in absentia* confirmation hearings when the suspect has "never appeared" before the Court.[13] This rejection indicates a deliberate choice to limit the provision to cases where an initial appearance has been made.

I.A.2. *In Arguendo*, the concept of 'cannot be found' cannot be used to address issues of state cooperation.

[8] As per *Kony,* the concept of '*cannot be found*' in Art. 61(2)(b) does not extend to a situation where the approximate whereabouts of the person are known but the execution of an arrest warrant is hindered due to a lack of state cooperation rather than difficulties in identifying the person's location.[14] *In casu*, the approximate whereabouts of Mr. Rhodes are known to be in Prala.[15] The inability to present him before the Court stems from the Prala's lack of cooperation rather than an inability to locate him.[16] Thus, he is not a person who '*cannot be found*' under Art. 61(2)(b).

I.B. ALL REASONABLE STEPS HAVE NOT BEEN TAKEN TO SECURE MR. JASPER RHODES'S APPEARANCE BEFORE THE COURT AND INFORM HIM OF THE CHARGES.

[9] Assessing whether 'all reasonable steps' have been taken under Art. 61(2)(b) requires an inquiry into the extent of engagement with relevant communities that could assist in securing the accused's presence.[17] In *Kony*, the PTC observed that the measures taken were "varied, extensive and reached

[9] KSC, *The Prosecutor v. Husni Gucati and Nasim Haradinaj*, KSC-BC-2020-07/IA001/F00005, Decision on Hysni Gucati's appeal on matters related to arrest and detention, 9 December 2020, para. 30.
[10] ICC, *Prosecutor v. Katanga*, ICC-01/04-01/07-3436, Judgment pursuant to Article 74 of the Statute, 7 March 2014, para. 46; ICC, *Prosecutor v. Ongwen*, ICC-02/04-01/15, Trial Judgement, 4 February 2021, para. 2722.
[11] STL, *The Prosecutor v. Slim Jamil Ayyash*, STL-18-10/I/TC, Decision to trial *in absentia*, 5 February 2020, para. 45.
[12] Vienna Convention on the Law of Treaties, Art. 32.
[13] Otto Triffterer and Kai Ambos, *Commentary on the Rome Statute of the International Criminal Court*, (3rd ed., 2016), pp. 1762-1763.
[14] ICC, *The Prosecutor v. Joseph Kony*, ICC-02/04-01/05, Decision on the criteria for holding confirmation of charges proceedings in absentia, 23 November 2023, para. 32.
[15] Case Facts, para 22.
[16] Id., para 23 and Exhibit 2.
[17] ICC, *The Prosecutor v. Joseph Kony*, ICC-02/04-01/05, Decision on the Kony Defene request for leave to appeal [the] "Decision on the criteria for holding confirmation of charges proceedings in absentia", 28 January 2025, para. 61.

a large population."[18] Furthermore, these steps should be "reasonable, adequate" and should take "into consideration the communication preferences of the local audiences".[19] Further, in light of the exceptional nature of *in absentia* confirmation hearings and their prejudicial effect on the suspect's rights, the prosecution bears the burden to show extremely substantial efforts.[20]

[10] Presently, the majority of efforts to locate Mr. Rhodes were conducted in English, a language that is not widely understood by the Pralan population.[21] This excludes a significant portion of the population from the outreach campaign. The only outreach initiative in Pralan was a ten-minute segment on the podcast 'Prowling Prala', which reaches approximately four million listeners in the border area between Croyla and Prala.[22] Thus, the Pralans being targeted by this podcast is a very small fraction of Prala's total population of 15 million.[23] Additionally, the limited geographical reach excludes vast portions of the Pralan population, particularly those not residing in the border region.

[11] Further, the effectiveness of methods such as the ICC website, social media broadcasts, and newspaper publications,[24] remains unclear due to the absence of data on their reach. Accordingly, these measures should not be given significant weight when assessing the reasonableness of efforts. The in-person engagement with relevant communities has also been insufficient. The total number of individuals engaged in both Prala and Raspia was a mere 108.[25] The attendees of these meetings were predominantly supporters of Rhodes, who, as a corollary, had incentives to not disclose his whereabouts.[26] *Per contra*, in *Kony*, interactive dialogues were conducted with religious and cultural leaders, civil society organizations, victim groups, and local government officials, reflecting a far more comprehensive and targeted engagement strategy.[27]

[12] Lastly, *Kony* also recognized that a "request for cooperation to locate and surrender the accused's is a necessary action in apprehending the accused". Art. 87(2)[28] read with RPE Rule 176[29] empowers the Registrar to negotiate *ad hoc* arrangements with non-party states like Prala to facilitate cooperation. Presently, the Registry merely requested a meeting with the Pralan government.[30] No attempts were made to enter into an *ad hoc* cooperation arrangement.

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[18] ICC, *The Prosecutor v. Joseph Kony*, ICC-02/04-01/05, Second decision on the Prosecution's request to hold a confirmation of charges hearing in the Kony case in the suspect's absence, 4 March 2024, para. 9.
[19] ibid.
[20] ICC, *The Prosecutor v. Joseph Kony*, ICC-02/04-01/05, Decision on the criteria for holding confirmation of charges proceedings in absentia, 23 November 2023, paras. 26 and 37.
[21] Case Facts, para 23 and Exhibit 2.
[22] id., Exhibit 2.
[23] id., para. 23 and Exhibit 2.
[24] id., Exhibit 2.
[25] ibid.
[26] ibid.
[27] ICC, *The Prosecutor v. Joseph Kony*, ICC-02/04-01/05, Second decision on the Prosecution's request to hold a confirmation of charges hearing in the Kony case in the suspect's absence, 4 March 2024, para. 7.
[28] Rome Statute, Art. 87(2).
[29] Rules of Procedure and Evidence, Rule 176.
[30] Case Facts, Exhibit 2.

[13] This inability to locate and secure Rhodes' presence also becomes relevant in determining the reasonability of the efforts put in to inform him of the charges. This is because the mode of communication of the charges greatly overlapped with the efforts made to locate him.[31] Thus, it should also be deemed that reasonable steps have not been taken to inform Rhodes of the charges.

I.C. *IN ARGUENDO* THERE IS NO CAUSE TO HOLD AN *IN ABSENTIA* TRIAL.

[14] Even if the two requirements discussed above are met, the decision to hold an *in absentia* confirmation hearing remains discretionary.[32] This is clear from the use of the word 'may' in Art. 61(2) and RPE Rule 125(1). The latter requires the PTC to determine "whether there is cause to hold a hearing on confirmation of charges in the absence of the person concerned."[33]

[15] While the RS does not provide a specific criteria to determine what constitutes 'cause', as per *Kony*, considerations relevant to determine cause include- (i) the impact on the defence rights of the concerned person; (ii) whether there is any realistic expectation that the accused will appear before the Court to face trial; (iii) the expectations of victims if charges were confirmed but a trial could not take place due to the continued absence of the person(s).[34] This exercise essentially aims to balance the need to deliver justice to the victims against the accused's rights.[35]

[16] An *in absentia* confirmation hearing has profound implications for the pre-trial rights of the accused. The suspect would not be able to apply for interim release pending trial as provided under Art. 60.[36] Art. 67 also provides rights that are to be informed to the accused at his initial appearance as per Art. 60(1), which would not be possible if the PTC decides to proceed *in absentia.*[37] Further, a defendant's ability to mount a defence is of utmost importance in the confirmation stage. His active in-person role is crucial as this is the last stage where he can prevent a potentially unfounded trial.[38]

[17] Furthermore, there is no indication that Mr. Rhodes will appear before the court, whether wilfully or unwillingly, in the future. Thus, even if the charges are confirmed, given that the RS does not allow for a trial *in absentia*,[39] merely confirming charges *in absentia* would lead to unjustified budgetary implications and frustration of the victim's expectations. This is compounded by the fact that the admissibility of the present case has not been confirmed yet. Thus, there is no cause to hold an *in*

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[31] ibid.
[32] ICC, The *Prosecutor v. Joseph Kony*, ICC-02/04-01/05, Decision on the criteria for holding confirmation of charges proceedings in absentia, 23 November 2023, para 5.
[33] Rules of Procedure and Evidence, Rule 125(1).
[34] id., para. 61.
[35] id., para. 64,
[36] Rome Statute, Art. 60.
[37] Rome Statute, Art. 60(1).
[38] ICC, *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11, Decision on the schedule for the confirmation of charges hearing, 12 February 2013, para. 9; *The Prosecutor v. Mahamat Said Abdel Kani*, Decision on the confirmation of charges against Mahamat Said Abdel Kani, ICC-01/14-01/21, 9 December 2021, para. 35.
[39] Gary J. Shaw, "Convicting Inhumanity in Absentia: Holding Trials in Absentia at the International Criminal Court", 44 *George Washington International Law Review*, 107 (2012), pp. 112-118.

absentia confirmation hearing as it would cause prejudice to the accused without benefitting the victims.

II. MR. JASPER RHODES'S PRIOR CONVICTION IN RASPIA RENDERS THE PRESENT CASE INADMISSIBLE BEFORE THE ICC IN ACCORDANCE WITH THE PRINCIPLE OF *NE BIS IN IDEM*.

[18] Principle of *ne bis in idem* is an internationally protected human right.[40] The '*upward'* conception of *ne bis in idem*, i.e., the double jeopardy principle, is codified under Art. 20(3) of the RS.[41] Art. 20(3) read with Art. 17(1)(c) renders a case inadmissible when the "same conduct" of an individual has already been the subject of a domestic trial that has attained finality.[42] Thus, it is submitted that Mr. Rhodes's conviction by the Raspian courts renders the present case inadmissible before the ICC **(II.A.)** and none of the exceptions under Art. 20(3) apply *in casu* **(II.B.)**.

[II.A.] MR RHODES'S CONVICTION IN RASPIA RENDERS THE CASE INADMISSIBLE BEFORE THE ICC.

[19] Art. 20(3) of the RS prohibits admission of a case against a person if the "*same conduct and same person*" test is satisfied.[43] The usage of "*conduct*" as opposed to "*crime*" in Art. 20(3) makes it apparent that it encapsulates an *in concreto* conception of *ne bis in idem*.[44] Thus, an identity of offences is not a requisite for the application of upward *ne bis in idem.*[45] As the term "same conduct" is also used in Art. 17, its jurisprudence becomes relevant to interpret Art. 20(3).[46] An accused's domestic trial for "*substantially the same conduct*" suffices to block a second trial before the ICC.[47]

[20] Presently, Mr. Rhodes has been convicted by the District Court of Brolin under the Raspian law for his alleged actions against the non-Raspian minority.[48] Mr. Rhodes's conviction has been further upheld by the Appeals Court.[49] The allegations forming the basis for the charge of incitement to commit genocide are rooted in the same factual conduct that led to his domestic conviction. The similarity in the factual conduct triggers the *in concreto* construction of *ne bis in idem*, as it blocks

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[40] ICCPR, Art. 14 para. 7; Antonio Cassese, Paola Gaeta and John RWD Jones, *The Rome Statute of the International Criminal Court: A Commentary*, (2002), p. 1244.
[41] Rome Statute, (2002), p. 716.
[42] Antonio Cassese, *The Oxford Companion to International Criminal Justice*, (2009), p. 304.
[43] ICC, *Prosecutor v. Katanga*, ICC-01/04/07-4, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, 6 July 2007, para. 20.
[44] M. Cherif Bassioundi, *The Legislative History of the International Criminal Court; Introduction, Analysis and Integrated Text* (2005), p. 100.
[45] Otto Triffterer and Kai Ambos, *Commentary on the Rome Statute of the International Criminal Court* (3rd ed., 2016), p. 810.
[46] M. Hadi Zakerhossein, *Situation Selection Regime at the International Criminal Court: Law, Policy, Practice* (2017), p. 276.
[47] ICC, *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11 OA 6, Judgement on the appeal of Mr. Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled "Decision on the admissibility of the case against Abdullah Al-Senussi", 24 July 2014, para. 119.
[48] Case Facts, paras. 20-21.
[49] ibid.

charges against the accused for a different offence as long as the basis of the later charges remains the same. Accordingly, Art. 20(3) applies and under Art. 17(1)(c) the case should be deemed inadmissible.

II.B. THE PRESENT CASE DOES NOT FALL UNDER ANY OF THE EXCEPTIONS UNDER ART. 20(3).

[21] Unlike earlier *ad hoc* tribunals like ICTY and ICTR, which were designed to have a vertical relationship with the domestic legal system, the RS envisages a semi-horizontal relationship between domestic courts and the ICC.[50] The complementarity principle evinces this relationship as it puts the primary responsibility of prosecuting individuals on the national courts allowing ICC's intervention only in exceptional circumstances without routinely overriding national judicial processes.[51]

[22] Thus, the exceptions to Art. 20(3) ought to be interpreted narrowly.[52] Furthermore, the prosecution bears substantial burden to establish that a case remains admissible despite prior domestic proceedings having already taken place.[53] Presently, such exceptional circumstances are absent and the case is neither covered under Art. 20(3)(a) **(II.B.1)** nor under Art. 20(3)(b) **(II.B.2)**.

II.B.1. The domestic trial was not conducted to shield Mr. Jasper Rhodes.

[23] Usage of the phrase "*purpose of shielding*" is indicative of the need to establish a state's specific, clear, and devious intention to protect an individual from genuine prosecution.[54] The establishment of the same places a very high burden of proof on the prosecution.[55] In this respect, sentencing cannot serve as the sole or even the primary indicator of shielding.[56] The non-authenticity of domestic trial proceedings serves as the primary determinant of the shielding intent.[57] This is in tandem with the observations of the Expert Group on complementarity, which held that the aforementioned assessment should focus on procedural and institutional factors, rather than on the substantive outcomes.[58]

[24] Focusing only on the punitiveness of domestic criminal justice systems is inconsistent with the complementarity regime, which goes beyond sentencing.[59] The modes and severity of punishment in domestic contexts are influenced by normative purposes and other interests that a certain community

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[50] Christian M. De Vos, *Complementarity, Catalysts, Compliance, The International Criminal Court in Uganda, Kenya, and the Democratic Republic of Congo*, (2020), p. 27; Yuval Shany, *Regulating Jurisdictional Relations between National and International Courts*, (2007), p. 35.

[51] Gerard Conway, "Ne Bis in Idem and the International Criminal Tribunals", *Criminal Law Forum*, 14 (2003), p. 352.

[52] Otto Triffterer and Kai Ambos, *The Rome Statute of the International Criminal Court: Article by Article Commentary* (3rd ed., 2016), p. 919.

[53] Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (2009), p. 90.

[54] Otto Triffterer and Kai Ambos, *The Rome Statute of the International Criminal Court: Article by Article Commentary* (3rd ed., 2016), p. 926.

[55] Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (2009), p. 90.

[56] C. Stahn, "One Step Forward, Two Steps Back? Second Thoughts on a "Sentence-Based" Theory of Complementarity", *Harvard International Law Journal*, 53 (2012), p. 183-196.

[57] Beatriz E Mayans-Hermida, Barbora Holá, Balancing 'the International' and 'the Domestic': Sanctions under the ICC Principle of Complementarity, *Journal of International Criminal Justice*, 18(5) (2020) 1108,

[58] Office of Prosecutor of the ICC, Informal Expert Paper: The Principle of Complementarity in Practice (2006), p. 14.

[59] Beatriz E Mayans-Hermida and Barbora Hola, "Balancing 'the International' and 'the Domestic': Sanctions under the ICC Principle of Complementarity", *Journal of International Criminal Justice*, 5 (2020), p. 1103-1130.

seeks to protect and wants to accomplish by sentencing.[60] The *travaux préparatoires* and Art. 80 of the RS make it apparent that the ICC's penalties regime was not meant to be a standard setting for national jurisdictions, and that under the Statute, states have leeway in determining the criminal sanctions for international crimes.[61] The principle of complementarity was designed to respect the principles and values at the core of national criminal justice systems and, thus, their penalty regimes — including those systems that are less punitive than the RS.[62]

[25] Presently, Mr. Rhodes's domestic trial was conducted under the new Raspian regime that resulted from the Cryolan intervention in Raspia.[63] There is no indication that there was any erroneous appreciation of evidence, whether deliberate or unintentional, manipulation of evidence, or disregard for relevant facts and obvious investigative steps, which are some factors that have been considered by Human rights Courts to determine shielding. Furthermore, it cannot be construed that the sentence given was lower than what was prescribed by the Raspian law. Merely focusing on the sentence given to Mr. Rhodes's would be in dissonance with the complementarity regime of the RS, which provides discretion to the states to determine their penal regime.[64]

[26] Furthermore, the propriety of the trial process, in terms of independence and impartiality, shall be addressed in the forthcoming sub-argument II.B.2. Hence, Mr. Rhodes's domestic trial was not done for the purpose of shielding him, and the exception under Art. 20(3)(a) shall not apply.

II.B.2. The domestic trial was conducted in an independent and impartial manner.

[27] Independence: The term independence should be defined in tandem with the human rights jurisprudence as per Art. 21 of the RS.[65] While ECtHR's *Campbell and Fell* judgment[66] had included the manner of appointment of a judicial body's members as a relevant factor in the determination of judicial independence, a judge's independence may be challenged successfully only if it is proved that the appointment procedure "as a whole is unsatisfactory."[67]Judicial appointment by heads of state is a common phenomenon across democracies.[68] Thus, the mere appointment of the judges of the Appeals Court by Mr. Rhodes should not be seen as a factor *per se* vitiating the their independence, especially when the judges have upheld the lower court's decision to convict acquit him.

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[60] Michael Tonry, "Purpose and Functions of Sentencing", *Crime and Justice*, 34 (2006), p. 43.
[61] Roelof Haveman and Olaoluwa Olusanya (eds), *Sentencing and Sanctioning in Supranational Criminal Law* (2006), pp. 48–49.
[62] Carsten Stahn, "One Step Forward, Two Steps Back? Second Thoughts on a "Sentence-Based" Theory of Complementarity, *Harvard International Law Journal*, 53 (2012), p. 190.
[63] Case Facts, paras. 20-21.
[64] Beatriz E Mayans-Hermida, Barbora Holá, "Balancing 'the International' and 'the Domestic': Sanctions under the ICC Principle of Complementarity", *Journal of International Criminal Justice*, 18(5) (2020), p. 1122.
[65] Rome Statute, Art. 21.
[66] ECtHR, *Campbell and Fell v. The United Kingdom*, Application no. 7819/77;7878/77, Judgment, 28 June 1984, para. 78.
[67] David Harris, Michael Boyle, and Warbrick, *Law of the European Convention on Human Rights*, (5th ed., 2023), p. 232.
[68] ECtHR, *Case of Sramek v. Austria*, Application no. 8790/79, Judgement, 22 October 1984, para. 42.

[28] Furthermore, the independence of a person can be questioned when it is proved that they are in "*a subordinate position in terms of his duties and the organization of his service, vis-à-vis one of the parties*."[69] As at the relevant period of Mr. Rhodes' trial, he was no more the President completely removed from the position of power, and had no role in appointment of the new President, no such relation of subordination existed.

[29] Impartiality: Only a complete absence of fairness and impartiality violates norms of due process under Art. 20(3), rendering a case inadmissible.[70] The independence of a judge, that has been established earlier, creates the conditions for impartiality. The human rights jurisprudence has developed a two-fold test to determine bias— the subjective test and the objective test.[71]

[30] The subjective test looks into the interest of a particular judge in a given case, it presumes the impartiality of a judge until there is proof to the contrary.[72] In the present case, a new President had been appointed, and Mr. Rhodes had no position of authority to interfere with the judiciary or have a say in judicial appointments.[73] Therefore, the judges of the domestic courts had no stakes in the outcome of Mr. Rhodes's Trial.Similarly, although the objective test for bias requires showing that there is no appearance of bias from the perspective of a reasonable person,[74] any allegations of partiality are sustained only if they "can be held to be objectively justified."[75]

[31] In this regard, the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and also apprised of the fact that impartiality is one of the duties that Judges swear to uphold.[76] In the present case, the prosecution has failed to provide any concrete evidence, such as inappropriate communications, political affiliations, or procedural irregularities, to support claims of bias. Moreover, the entire trial proceedings involved multiple judges and appellate stages. Thus, in the absence of any concrete evidence, the likelihood of a collective bias is far-fetched and cannot be presumed.

ISSUE III. MR. RHODES IS NOT CRIMINALLY LIABLE FOR THE CRIME OF DIRECT AND PUBLIC INCITEMENT TO COMMIT GENOCIDE.

[32] Mr. Rhodes's actions do not constitute the crime of direct and public incitement to genocide under Art. 25(3)(c) of the RS [77] as incitement to genocide is not an independent crime under the RS

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[69] ibid.
[70] ICC, *The Prosecutor v. Saif Al-Islam Gaddafi*, ICC-01/11-01/11-466, Decision on the admissibility of the case against Abdullah Al-Senussi, 11 October 2013, paras. 188 and 241.
[71] ECtHR, *Piersack v. Belgium*, Application no. 8692/79, Judgment, 1 October 1982, para. 30.
[72] ibid; ECthR, *Steck-Risch v. Liechtenstein*, 63151/00, Judgment, 19 May 2005, para. 40.
[73] Case Facts, paras. 18 and 19.
[74] ICTY*, The Prosecutor v. Anto Furundžija*, IT-95- 17/1-A, Appeals Chamber Judgement, 21 July 2000, para 189.
[75] ECtHR, *Case of Pabla Ky v. Finland*, 472221/99, Judgement, 22 September 2004, para. 30; ECtHR, *Wettstein v. Switzerland*, 33958/96, Judgement, 21 March 2001, para. 44.
[76] ICTY, *The Prosecutor v. Anto Furundžija*, IT-95- 17/1-A, Appeals Chamber Judgement, 21 July 2000, para. 190.
[77] Rome Statute, Art. 25(3)(e).

(III.A). *In arguendo*, even if it is considered an independent crime, the Art. 25(3)(e)'s requisites have not been satisfied **(III.B.)**.

III.A. Direct And Public Incitement To Genocide Is Not An Independent Crime Under The Rome Statute.

III.A.1. Textual Interpretation.

[33] The RS places direct incitement and public incitement to genocide under Art. 25 rather than Arts. 5 or 6, thus 'relegating' its status from that of an independent crime.[78] Art. 25 contains crimes that are not distinct in themselves and, therefore, need to be attached to an underlying crime,[79] making the occurrence of the underlying crime necessary for the attachment of liability.[80] Apart from 'attempts' to crime, all other modes of liability under Art. 25 require proof of a causal connection.[81] However, incitement is fully committed in the underlying crime itself, which suggests that the statute does not treat it as an separate crime.[82]

[34] This interpretation aligns with the principle that expansion of criminal liability cannot be done to the prejudice of the accused.[83] Under the *rule of lenity*, ambiguous texts should be interpreted in a manner favourable to the accused, as per international jurisprudence.[84] Thus, any expansion of the RS to independently criminalize incitement beyond its textual limits would be unfair.[85] Additionally, attempts cannot be equated with incitement, further emphasizing that incitement lacks a necessary connection to an unconsummated crime.[86]

III.A.2. Intention of the Drafters.

[35] There is no exact record explaining why the drafters of the RS placed incitement under Art. 25 rather than recognizing it as an independent crime.[87] However, the mere fact that the Statute was drafted this way does not imply that the drafters did not consider the issue.[88] Elevating incitement to an independent crime could restrict freedom of speech and allow its misuse as a political tool.[89] Therefore, treating incitement as a crime depending on an underlying offence, emerges as the legally sound interpretation within the RS framework.

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[78] Davies, "How the Rome Statute Weakens the Prohibition of Incitement to Genocide," *Harvard Human Rights Journal*, 22 (2009), p.17.
[79] Richard Ashby Wilson, *Incitement on Trial: Prosecuting International Speech Crimes* (1st ed., 2017) p. 33.
[80] Ibid.
[81] Davies, "How the Rome Statute Weakens the Prohibition of Incitement to Genocide", *Harvard Human Rights Journal*, 22 (2009), p.22.
[82] Ibid.
[83] ICTR, *The Prosecutor v. Kayishema*, ICTR-95-1-T, Judgment, 21 May 1999, para. 103.
[84] Allison Danner and Jenny, "Guilty Associations: Joint Criminal Enterprise", *California Law Review*, 93 (2005), p. 84.
[85] Davies, "How the Rome Statute Weakens the Prohibition of Incitement to Genocide", *Harvard Human Rights Journal*, 22 (2009), p.19.
[86] ibid.
[87] Robert Cryer, *An Introduction to International Criminal Law and Procedure* (2007), pp. 121–122.
[88] Davies, "How the Rome Statute Weakens the Prohibition of Incitement to Genocide", *Harvard Human Rights Journal*, 22 (2009), p. 25.
[89] U.N. Doc. A/87/PV.6 (1948), p.213-214 (U.N. GAOR).

III.B. *IN ARGUENDO*, NEITHER THE *ACTUS REUS* NOR *MENS REA* FOR ART. 25(3)(E) HAVE BEEN SATISFIED.

[36] Direct and public incitement to genocide has two elements a direct and public call that incites (*actus reus*) (III.B.1.) and a specific *mens rea*, i.e., *genocidal* intent (*dolus specialis*) (III.B.2).[90] Neither of the two can be established *in casu.*

III.B.1. There is no *actus reus* as Mr. Rhodes' posts do not directly encourage the commitment of genocide.

[37] As the ICC has not yet established elements of incitement to genocide, Art. 21(1)(b) of the Statute requires reliance on international law.[91] *Akayesu* held that incitement requires words that "specifically provoke" genocide.[92] Hate speech or inciting violence do not suffice unless there is a clear and specific call for genocide.[93] International law does not criminalise incitement to any other crime. Thus, statements that incite acts that do not amount to genocide should not be criminalised.[94] While the prosecution bears the burden to identify specific acts that directly encourage genocide, the PTC should also look at the statements in their individual meanings and not their general impression.[95]

[38] The defence identifies ten statements from the facts that may be used by the prosecution:

(1) Our Adrelan neighbours are incapable of living side-by-side with us…. "…makes it impossible for this country to survive with them in it."[96]

(2) We must remove this plague of violence from our streets through any means necessary.[97]

(3) As Osin teaches us, sometimes peace and love must be protected by force.[98]

(4) Raspian citizens have a right to self-defence against the terrorists who are bombing us.[99]

(5) Our soldiers are fighting to protect us from the Adrelan threat. We, as Raspia citizens, must do everything we can to support them, even if it means taking up arms.[100]

(6) Raspia should only count civilians devoted to Osin. Any other faith is barbarism.[101]

(7) Barbarism must be neutralised.[102]

(8) It is only a matter of time before we defeat them. How can we help?[103]

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[90] Antonio Cassese, et. Al., *International Criminal Law, Cases and Commentary* (2011), p. 413.
[91] Rome Statute, Art. 21(1)(b).
[92] ICTR, *The Prosecutor v. Akayesu*, ICTR- 96- 4- T, Judgement, 2 September 1998, para. 557.
[93] ICTR, *Nahimana v. The Prosecutor*, ICTR99-52-A, Judgement, 28 November 2007, para.692.
[94] ICTR, *The Prosecutor v. Akayesu*, ICTR- 96- 4- T, Judgement, 2 September 1998, para. 562.
[95] ICTR, *Nahimana v. The Prosecutor*, ICTR-99-52-A, Judgement, 28 November 2007, paras. 726-727.
[96] Case Facts, para. 17.
[97] ibid.
[98] ibid.
[99] Case Facts, Exhibit 1.
[100] ibid.
[101] Case Facts, Exhibit 1.
[102] ibid.
[103] ibid.

(9) Fight all terrorists in your neighbourhood. Raspian safety depends on it.[104]

(10) We will no longer tolerate their violence. We rebel, whatever the cost.[105]

[39] The defence is further clubbing these into three groups: (i) expulsion narrative, (ii) stopping violence narrative, and (iii) potential calls for violence against the Adrelans.

(i) ***Expulsion Narrative*** (Posts: 1, 2, 3, 6) – ICJ confirms that ethnic cleansing, i.e. "rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area", if not more, does not equate to genocide.[106] The ICTY held that the "expulsion of a group" is not genocide in itself.[107] The narrow interpretation of genocide restricting it to requiring the intent to 'physically' destroy a group must prevail owing to the principle of *nullum crimen sine lege*, as per which any ambiguity of law should favour the defendant.[108] Calls for the removal of Adrelans from Raspia are expulsion calls and are not incitement to genocide since the method by which this expulsion is to be achieved is not clear.

(ii) ***Stopping Violence Narrative*** (Posts: 2, 4, 5, 8, 10) – The ICTR in *Nahimana* stated that the purpose of incitement must be objectively interpreted, and words must have only one reasonable interpretation: encouragement of genocide.[109] If language is ambiguous despite being interpreted in context, it cannot constitute incitement.[110] Thus, the calls for religious purity, while concerning, indicate expulsion rather than genocide. These posts focus on resistance against the actual context of a perceived and ensuing Adrelan violence but do not explicitly or unambiguously call for genocide and thus cannot constitute incitement.

(iii) ***Potential Calls for Violence*** (Posts: 7, 9) – Words such as "barbarism" and "taking up arms to protect from violence" are vague and do not explicitly call for genocide. *In arguendo*, these do not amount to direct incitement to genocide because genocide requires intent to destroy a 'substantial' part of the group.[111] In *Croatia v. Serbia* the ICJ held that the killing of 12,500 Croats did not constitute genocide because the greater portion of the population had fled.[112] Similarly, *Al Bashir* held that the murder of thousands of civilians did not amount to genocide in light of the majority of inhabitants neither being killed nor injured.[113] In our case, the absence of large-scale killings, let alone the absence of genocide, [114] negates the claim of incitement to genocide as no intent to 'destroy' a 'substantial' part of the Adrelan group can be inferred.

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[104] ibid.
[105] ibid.
[106] ICJ, *Bosnia and Herzegovina v. Serbia and Montenegro*, ICJ General List 91, Judgment, 26 February 2007, para. 190.
[107] ICTY, *The Prosecutor v. Stakić*, IT-97-24-T, Judgement, 31 July 2003, para. 519.
[108] Rome Statute, Art. 22 (2).
[109] ICTR, *Nahimana v. The Prosecutor*, ICTR-99-52-A, Judgement, 28 November 2007, para. 706.
[110] ICTR, *Karamera v. The Prosecutor*, ICTR-A, Judgement, 2009, para. 716.
[111] ICJ, *Croatia v. Serbia*, ICJ General List 118, Judgement, 3 February 2015, para 437.
[112] ibid.
[113] ICC, *The Prosecutor v. Omar Al Bashir*, ICC-02/05-01/09, Judgement, 4 March 2009, paras. 192-196 and 205.
[114] Case Facts.

[40] While *Nahimana* defined incitement by drawing from elements of hate speech, hate speech in itself is not a crime under international law.[115] *Prosecutor v. Kordic* acknowledged that hate speech is not considered a crime under customary international law.[116] Thus, all of the aforementioned texts may amount to hate speech, but they do not constitute the *actus reus* for incitement to genocide.

III.B.2. The requisite *mens rea,* i.e., *dolus specialis* does not exist.

[41] The ICTR found that *dolus specialis* can be inferred either from words or deeds, together with evidence such as the physical targeting of a group or its property, and the use of derogatory language toward members of the targeted group.[117] Mr. Rhodes's statements reveal no deeds in place and no physical targeting done. The ICTR in *Nahimana* stated that incitement's actual effect is relevant to determining intent.[118] However, no such effect ever materialized *in casu*. The intent of the statement would be ethnic exclusion rather than genocide.

[42] *Al Bashir* reaffirmed that acts of violence must be primarily aimed at group destruction, not mere expulsion or intimidation.[119] There is no record of genocide occurring presently. Since no one was incited, it follows that the texts did not have the intent or effect of inciting genocide. Furthermore, there are insufficient grounds to believe that Mr. Rhodes statements are "primarily aimed" at destroying the group physically, as opposed to using "intimidation" to expel them from the community, which does not constitute incitement.[120] Thus, the alleged acts can be better said to be intimidation tactics rather than constituting direct incitement to genocide. As a corollary, the statements do not meet the threshold of direct provocation.

PRAYER FOR RELIEF

The Defence requests that the Court declare:

[1] The prerequisites for holding a confirmation of charges hearing *in absentia* against Mr. Rhodes have not been satisfied.;

[2] Mr. Jasper Rhodes' previous conviction in Raspia for the crime of hate speech renders the present case inadmissible before the ICC;

[3] Mr. Jasper Rhodes is not liable for causing direct and public incitement to commit genocide.

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[115] Diane F. Orentlicher, "Criminalizing Hate Speech in the Crucible of Trial: Prosecutor v. Nahimana", *American University International Law Review*, 21 (2005), p. 18.
[116] ICTY, *The Prosecutor v. Kordic*, IT-95-14/2-T, Judgment, 26 February 2001, para. 209.
[117] ICTR, *Kayishema and Ruzindana*, ICTR-95-I-T, Judgement, 21 May 1999, para. 93.
[118] ICTR, *Nahimana v. The Prosecutor*, ICTR-99-52-A, Judgement, 28 November 2007, para. 709.
[119] ICC, *The Prosecutor v. Omar Al Bashir*, ICC-02/05-01/09, Judgement, 4 March 2009, paras. 192-196 and 205.
[120] ICTY, *The Prosecutor v. Kupreškić*, IT-95-16-T, Judgement, 14 January 2000, para. 751.